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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation on June 26, 2002

NOTICE OF ACTION TAKEN -- DOCKET OST-2002-12568 -- 5

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Applicant: Antonov Design Bureau

Date Filed: June 24, 2002

Relief requested: Exemption pursuant to 49 U.S.C. section 40109(g) to operate one one-way emergency cabotage cargo flight from Honolulu, Hawaii, to Pago Pago, American Samoa, on/about June 24-27, 2002, using its AN-124 aircraft to transport one outsized DC-10 aircraft engine on a stand, plus ancillary equipment, on behalf of Hawaiian Airlines, Inc., to restore one of its aircraft to service. Antonov stated that a DC-10 aircraft operated by Hawaiian Airlines in scheduled service is on the ground in Pago Pago with mechanical problems; that the nearest replacement engine is located at Hawaiian's facilities in Honolulu; that expedited delivery by air of this engine is critical in order to minimize disruptions to the carrier's scheduled service and inconvenience to numerous passengers; and that because of the size of the cargo transportation on U.S. carrier aircraft was not possible.

Applicant representative: Sheryl Israel 202-663-8060

Responsive pleadings: Antonov served its application on those U.S. carriers operating large all-cargo aircraft. Except as noted below, each carrier indicated that it did not have aircraft available to conduct the proposed operation and that it had no comment or did not oppose grant of the requested authority to Antonov.

Atlas Air filed an answer pointing out that Antonov's characterization of the cargo as "outsized" appears erroneous, that Atlas can and from time to time does carry DC-10 engines on its Boeing 747 freighters. Atlas further states that, while it is refraining from filing an objection because the cargo allegedly needs to be transported right away and it would not have flight availability until the end of the week, it is urging the Department to take this opportunity to emphasize the importance of foreign carriers unambiguously meeting the applicable cabotage statutory standards for grant of exemptions under 49 U.S.C. 40109(g).

Antonov filed a reply stating that its characterization of the cargo as outsized was based on a misunderstanding of the reason why the use of an AN-124-100 aircraft was necessary, and that it has subsequently learned from Hawaiian that the primary reason U.S. carriers, and more particularly B-747 operators, determined they were unable to accommodate the traffic was due to the absence of a main-deck loader for wide-body aircraft at the Pago Pago airport, meaning that there was no feasible way to offload the cargo without risking damage to the aircraft and the cargo. Antonov also states that it recognizes the importance of providing, and strives to provide, complete and accurate information in its applications. It further states that, notwithstanding the ostensibly non-outsized nature of the cargo, no U.S. carrier is available to accommodate the traffic given the lack of offloading capabilities at Pago Pago, and thus its application meets the standards for grant of an exemption under the emergency cabotage provisions, in view of the fact that U.S. air carriers cannot accommodate the traffic in the market.

Statutory Standards: Under 49 U.S.C. section 40109(g), we may authorize a foreign air carrier to carry commercial traffic between U.S. points (*i.e.*, cabotage traffic) under limited circumstances. Specifically, we must find that the authority is required in the public interest; that because of an emergency created by unusual circumstances not arising in the normal course of business the traffic cannot be accommodated by U.S. carriers holding certificates under 49 U.S.C. section 41102; that all possible efforts have been made to place the traffic on U.S. carriers; and that the transportation is necessary to avoid unreasonable hardship to the traffic involved (an additional required finding, concerning emergency transportation during labor disputes, was not relevant here). For examples of earlier grants of authority of this type, *see*, *e.g.*, Order 2001-5-23.

DISPOSITION

Action: Approved

Action date: June 26, 2002

Effective dates of authority granted: June 26-30, 2002

Basis for approval: We found that the application met all the relevant criteria of 49 U.S.C. section 40109(g) for the grant of an exemption of this type and that the grant was required in the public interest. Specifically, we were persuaded that Hawaiian Airlines' unforeseen need to transport the DC-10 engine without delay in order to repair and return its grounded aircraft to service, and the fact that the cargo could not be transported by other modes without causing further disruptions in its scheduled Pago Pago-Honolulu service, constituted an emergency not arising in the normal course of business. Moreover, based on the representations of the U.S. carriers, including Atlas and other elements of record, we concluded that no U.S. carrier had aircraft available which could be used to conduct the operation at issue here.¹ We also found that grant of Antonov's request would prevent undue hardship to the cargo and Hawaiian Airlines. Finally, we found that the applicant was qualified to perform its proposed operations (*see, e.g.*, Notice of Action Taken dated August 7, 2001, in Docket OST-96-1454).

Except to the extent exempted/waived, this authority is subject to our standard exemption conditions (attached) and to the condition that Antonov comply with an FAA-approved flight routing for the authorized flight.

Action taken by: **Read C. Van de Water**
Assistant Secretary for Aviation
and International Affairs

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp*

¹ In particular, we note Atlas' statement that it does not have aircraft available to conduct this operation, and the statements by Antonov concerning the lack of suitable equipment at Pago Pago to offload the cargo from the main deck of a B-747 freighter.

FOREIGN AIR CARRIER CONDITIONS OF AUTHORITY

In the conduct of the operations authorized, the holder shall:

- (1) Not conduct any operations unless it holds a currently effective authorization from its homeland for such operations, and it has filed a copy of such authorization with the Department;
- (2) Comply with all applicable requirements of the Federal Aviation Administration, including, but not limited to, 14 CFR Parts 129, 91, and 36;
- (3) Comply with the requirements for minimum insurance coverage contained in 14 CFR Part 205, and, prior to the commencement of any operations under this authority, file evidence of such coverage, in the form of a completed OST Form 6411, with the Federal Aviation Administration's Program Management Branch (AFS-260), Flight Standards Service (any changes to, or termination of, insurance also shall be filed with that office);
- (4) Not operate aircraft under this authority unless it complies with operational safety requirements at least equivalent to Annex 6 of the Chicago Convention;
- (5) Conform to the airworthiness and airman competency requirements of its Government for international air services;
- (6) Except as specifically exempted or otherwise provided for in a Department Order, comply with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses;
- (7) Agree that operations under this authority constitute a waiver of sovereign immunity, for the purposes of 28 U.S.C. 1605(a), but only with respect to those actions or proceedings instituted against it in any court or other tribunal in the United States that are:

(a) based on its operations in international air transportation that, according to the contract of

carriage, include a point in the United States as a point of origin, point of destination, or agreed stopping place, or for which the contract of carriage was purchased in the United States; or

(b) based on a claim under any international agreement or treaty cognizable in any court or other tribunal of the United States.

In this condition, the term "international air transportation" means "international transportation" as defined by the Warsaw Convention, except that all States shall be considered to be High Contracting Parties for the purpose of this definition;

(8) Except as specifically authorized by the Department, originate or terminate all flights to/from the United States in its homeland;

(9) Comply with the requirements of 14 CFR Part 217, concerning the reporting of scheduled, nonscheduled, and charter data;

(10) If charter operations are authorized, except as otherwise provided in the applicable aviation agreement, comply with the Department's rules governing charters (including 14 CFR Parts 212 and 380); and

(11) Comply with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department, with all applicable orders or regulations of other U.S. agencies and courts, and with all applicable laws of the United States.

This authority shall not be effective during any period when the holder is not in compliance with the conditions imposed above. Moreover, this authority cannot be sold or otherwise transferred without explicit Department approval under Title 49 of the U.S. Code (formerly the Federal Aviation Act of 1958, as amended).

